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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1541

SCHOOL DISTRICT OF THE CITY OF FERNDALE, MICHIGAN
Petitioner,

vs.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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REASONS FOR GRANTING THE PETITION

The events which have occurred subsequent to the denial of Petitioner's petition for writ of certiorari, mandate that this Court now grant the petition for writ of certiorari. The Court in *Keyes* v *School District No 1,* 413 U.S. ....., 37 L. Ed. 2d 548, 93 S. Ct. 2686 (1973) set down tests and guidelines in cases where segregation is not compelled or authorized by statute, and the hearing examiner and the

Court of Appeals acted contrary to these tests and guidelines in deciding the instant case. Four members of this Honorable Court felt that *Keyes, supra,* was significant enough to warrant the granting of a petition for writ of certiorari in *Cisneros* v *Corpus Christi Independent School District,* No 72-649, 37 L. Ed. 2d 1044 (1973). The injustice of the lower court's decision and the national significance of the instant case are far greater than in *Cisneros, supra.*

The order appealed from cuts off all federal funds including those to the integrated junior high school and high school and those designated for low income families until Petitioner takes some unspecified action to rectify an allegedly illegal situation which it did not create. This Court, by granting the petition for writ of certiorari, can remedy this inequitable decision while establishing guidelines for future H.E.W. cases and cases involving small suburban school districts where the alleged school segregation is a consequence of other types of state action without any discriminatory action by school authorities.

Despite alleged imperfections, Ferndale is one of the few racially integrated school districts in the Detroit suburbs. By virtue of Respondent's action, federal funds which continue to flow to districts which are not integrated, are being withheld from Petitioner. Surely, those districts which have no black students cannot suffer a loss of federal funding because of "imperfect integration", yet Ferndale incurs such a loss because of demographic circumstances occurring 48 years ago.

I.

THE EFFECT OF THE DECISION IN KEYES v. SCHOOL DISTRICT NO. 1.

While there are obvious distinctions between the Denver school district and the Ferndale school district, there are similarities which make the decision and rationale of *Keyes, supra* relevant to the instant case. Both systems have never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education. In both there was one segment of the school district which was alleged to be segregated raising the issue of whether that one segment made the entire school district segregated. The Ferndale school district is substantially less segregated since only one elementary school out of a total of ten is alleged to be illegally segregated, since the junior high school and high school are fully integrated, and since every child in Ferndale receives at least six years of fully integrated education. In addition, the conduct of the Denver school board in connection with the segregated area (Park Hill) was determined to have been the cause of the segregation while in the Ferndale district the primary evidence regarding the racial composition of the Grant School was directed to the conduct of agencies and individuals other than the Ferndale school board.

The Court in *Keyes, supra* stated that the plaintiffs in a civil rights action must first show a racially discriminatory purpose on the part of the school board as to a significant or meaningful portion of a school system and secondly, that there was a causal relationship between the acts and the racial imbalance which resulted. It is obvious that had the hearing examiner or the Court of Appeals applied the standards set forth in *Keyes, supra,* the ruling

would have been favorable to Petitioner. The composition of Grant School was determined by a neighborhood school plan adopted in 1921, more than five years before the Grant School was built in 1926. Almost all of the evidence introduced by Respondent to rebut this fact was directed to the actions of entities other than the School Board. Despite disclaimers by the hearing examiner that testimony with regard to FHA policies (long since abandoned), restrictive covenants (invalid for over 25 years), private real estate practices and governmental zoning policies were not the controlling reasons for his decision, it is obvious he relied heavily on this evidence. There was no substantial evidence that the school board had done anything other than follow and implement a neighborhood school plan adopted five years prior to the construction of Grant School at a time when there was no meaningful concentration of black children. Justice Powell, in his concurring opinion in *Keyes,* 37 L. Ed. 2d at page 573, defines an integrated system and sets forth the duties and obligations of the school board in connection therewith. It appears that the Ferndale school board is complying with these duties and obligations. As Justice Powell states, an integrated system does not mean that *every school* must, in fact, be an integrated institution. Since there is no substantial evidence of a racially discriminatory purpose on the part of Petitioner, and since the alleged segregation does not encompass a significant portion of the school system, Respondent has failed to meet the first test set forth in *Keyes, supra.*

The causal relationship between the alleged illegal acts of the school board and the racial imbalance was not even considered by the hearing examiner. There is no finding of fact or conclusion of law that a lesser degree of segregation would have occurred in the school district had the school board not acted as it did. The Court stated in *Keyes, supra:*

> "This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did. In Swann, we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention." 37 L. Ed 2d at 574.

There was no finding of fact or conclusion of law regarding this issue because there was no evidence which would have supported such a finding. This crucial omission justifies a reversal of the hearing examiner's decision, or at the very least, that the case be remanded for further consideration.

II.

THE REMEDY DECREED BY THE HEARING EXAMINER IS CONTRARY TO LAW AND EQUITY.

The entire Ferndale school district has been denied all Federal funds including the right to apply for such funds in the future. This cut off applies to the primary and secondary schools as well as to programs which were designed to benefit low income families.

The inequity of penalizing the children who attend the single junior high school and high school because of the alleged segregation in one of the ten elementary schools was recognized by one of the members of the H.E.W. Reviewing Authority. (Dissenting opinion, William F. Able, Member, Reviewing Authority). (Appendix pp. 91a-92a.) Even the hearing examiner recognized that he could

not cut off funds to the secondary schools without concluding that these completely integrated schools were somehow operated in a discriminatory manner. So without a single finding of fact or a scintilla of evidence to support such a conclusion, he makes a conclusion of law that,

> "The existence of the illegal segregation of students and faculty in the elementary schools of the District so infects the rest of the system as to render discriminatory all aspects of the operation of Respondent School District's system of elementary and secondary instruction . . ." Hearing Examiner's Conclusions of Law, Number 19, Appendix, p 47a.

In addition to the harshness of the remedy, absolutely no guidelines are set forth as to what Petitioner must do in order to again obtain Federal funds. The school district could have to bus children from the Grant School into every other school and bus children from every other elementary school into Grant so that the ratio of minority students in each school is equal to the ratio of minority students in the entire school district, and this might be only the beginning of the reshuffling required. This Court stated in *Swann,*

> "The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes

> beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination . . ." 402 U.S. at 22-23.

In his concurring opinion in *Keyes, supra* Justice Powell stated,

> "With most constitutional violations, the major burden of remedial action falls on offending state officials. Public officials who act to infringe personal rights of speech, voting, or religious exercise, for example, are obliged to cease the offending act or practice and, where necessary, institute corrective measures. It is they who bear the brunt of remedial action, though other citizens will to varying degrees feel its effects. School authorities responsible for segregation must, at the very minimum, discontinue segregatory acts. But when the obligation further extends to the transportation of students, the full burden of the affirmative remedial action is borne by children and parents who did not participate in any constitutional violation." 37 L. Ed. 2d at 586-87.

This is the situation in the Ferndale school district. The Department of Health, Education and Welfare is withholding funds from an integrated high school, from an integrated junior high school, and from those children that Congress has determined are entitled to the funds necessary to enable them to benefit from a public school education.

Any efforts by Petitioner to comply with the hearing examiner's vague order will, at the very minimum, require young children to attend schools further from their homes than they are now attending. No other school children in the metropolitan Detroit area are presently required to

do that. There is now pending in this Court the case of *Bradley* v *Milliken,* No. 73-424, dealing with the issue of school desegregation in the metropolitan Detroit area. It is highly probable since Ferndale has been made a part of a metropolitan Detroit desegregation plan by the *Bradley* case, that Petitioner might be required by H.E.W. to do certain things to comply with its Order, and something entirely different once this Court has decided the *Bradley* case.

III.

THE INSTANT CASE IS ONE WITH GREAT NATIONAL SIGNIFICANCE.

This Court has decided cases from areas where segregation had been mandated by legislation and from large Northern metropolises. This case is the first in what could be many involving suburban school districts with the typical pyramid system of a number of grade schools culminating in one or two junior high schools and a single high school, and the first of what will likely be many cases instituted by the Department of Health, Education & Welfare. There is a vital need for this Court to set standards in these cases as to what constitutes a violation of the act, and what a school district must do to comply with the act. There is nothing in the act, there are no regulations and no one has been able to give any definite answers. In addition, this is a case involving the issue of school segregation as a consequence of other types of state action, without discriminatory action by school authorities. As the Court stated in *Swann,*

> ". . . We do not reach in this case the question of whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities,

is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it." 402 U.S. at 22-23.

In a case where a substantial wrong has been done and where so many questions as yet unresolved by this Court are in issue, this Court should grant Petitioner's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

In the Supreme Court of the United States

School District of the City of Ferndale, Michigan Petitioner, v Department of Health, Education and Welfare, Respondent.	No 72-1541

State of Michigan,
County of Oakland—ss.

Burton R. Shifman, being duly sworn, deposes and says:

1. That he is the attorney for the School District of the City of Ferndale, Michigan, Petitioner in the above

entitled cause, and makes this Certificate of Counsel in accordance with Rule 58 of the Rules of the Supreme Court of the United States.

2. That the Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, being filed herewith, is presented in good faith and not for purposes of delay, and that said Petition for Rehearing is restricted to grounds of intervening circumstances of a substantial and controlling effect upon the instant case, as set forth in said Petition for Rehearing.

Further, deponent sayeth not.

/s/ BURTON R. SHIFMAN

Subscribed and sworn to before me this 21st day of December, 1973.

/s/ Philip J. Goodman
Notary Public
Oakland County, Michigan
My Commission expires:
June 8, 1977